

AGENCY: Bureau of Indian Affairs

ACTION: Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah

SUMMARY: The Bureau of Indian Affairs (BIA) is issuing the Record of Decision (ROD) for a proposed lease of tribal trust lands between Private Fuel Storage, L.L.C. (PFS) and the Band. The BIA analyzed the impacts of the proposed lease on the quality of the human environment under the National Environmental Policy Act (NEPA). The BIA issued a draft environmental impact statement (EIS) in June 2000, and the final EIS (FEIS) in December 2001.

The FEIS analyzes the effects of the construction and operation of an ISFSI for two distinct proposed sites on land held in trust by the United States for the benefit of the Band on its reservation, two different methods of transporting the spent nuclear fuel (SNF) from an existing Union Pacific rail line 39 km (24 miles) north of the proposed sites, and one alternate site in Wyoming. The Nuclear Regulatory Commission (NRC) is the lead agency; the Bureau of Land Management (BLM), the Surface Transportation Board (STB) and the BIA are cooperating agencies for the EIS. Each agency participated in the NEPA process within the scope of its respective responsibility. In this Record of Decision (ROD), the BIA is announcing its decision to disapprove the proposed lease and choose the no action alternative.

The BIA decision is based on review of the draft EIS; the FEIS; comments received from the public, other Federal agencies, and State and local governments; consideration of the required factors under the Indian Long-term Leasing Act and implementing regulation; and discussion of all the alternatives with the cooperating agencies.

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SUPPLEMENTARY INFORMATION

The Skull Valley Band of Goshute Indians

The Band is a federally recognized Tribe with 125 enrolled members. The Band's reservation consists of 18,540 acres in Tooele County, Utah, about 70 miles West of Salt Lake City. As of the date of this ROD, approximately 30 Band members live on the reservation.

Spent Nuclear Fuel

SNF consists mainly of intact fuel rods removed from a nuclear reactor. The rods contain pellets of uranium, each about the size of a pencil eraser, that are the source of heat inside a reactor vessel. While in the reactor, the uranium is used up and fission by-products accumulate and degrade the efficiency of the fuel rods until they can no longer effectively power the reactor. When removed from reactors, the uranium pellets stay in

the fuel rods, which remain highly radioactive and must be stored in specially constructed pools of water (“wet storage”) or in specially designed containers cooled by natural airflow (“dry storage”) until the radioactivity decreases to safer levels, a process that can take thousands of years.

The NRC has statutory authority to license both wet and dry SNF storage facilities. As of the date of this ROD, NRC has licensed 42 ISFSI facilities across the United States. Most of these are located with the nuclear reactors where the SNF is generated. The NRC has commented that the SNF is safely stored at the locations where it is currently located.¹ The proposed ISFSI at the Goshute Reservation is the first large, away from point-of-generation repository of its type to be licensed by the NRC.

The Proposed ISFSI

The ISFSI proposed for the Goshute Reservation would be operated by PFS, a private, non-governmental entity composed of eight NRC-licensed nuclear power generators.² Under its proposed plan, PFS would accept SNF under contract from its constituent members and other NRC-licensed nuclear power generators across the country. SNF would be shipped by rail or by rail and heavy haul truck (as discussed in the FEIS analysis below) to the proposed ISFSI from all parts of the United States. The generators would retain title to the SNF while in transit to the proposed ISFSI and while it is stored there. At the proposed ISFSI, the stainless steel shipping containers that hold the SNF would be placed in DOE-designed, NRC-licensed steel and concrete storage

¹ See FEIS Response to Comments, Section G.3.2.1; G.3.5.1.4.

² Those generators are: Indiana-Michigan Power Company (American Electric Power); Entergy Corporation; GPU Nuclear Corporation; Xcel Energy; Florida Power and Light Company; Southern Nuclear Operating Company; Southern California Edison Company; Genoa Fuel Tech, Inc.

casks. The casks would then be placed on concrete pads in the open air inside the secure portion of the ISFSI. The SNF would remain highly radioactive throughout its stay at the ISFSI on the Goshute Reservation and would generate large amounts of heat as the fuel pellets continue to decay. This heat would be dissipated by the natural flow of air around the storage casks.

On February 21, 2006, the NRC issued a license to PFS for the construction and operation of the proposed ISFSI.³ Under the license, PFS may store up to 40,000 metric tons of SNF at the proposed ISFSI on the Goshute Reservation. The license term is 20 years, with an option that allows PFS to apply for renewal for an additional 20 years. The NRC has stated in response to comments to the Draft EIS that it would not grant a renewal that would extend beyond the term of the proposed lease.⁴ PFS may not begin construction, however, until it has met several other NRC requirements, and until the BIA takes action on the proposed lease.

The Proposed Lease

In May 1997, the Band and PFS signed the First Amended and Restated Lease ("first lease") for the proposed ISFSI. Under the first lease, PFS would construct and operate the NRC-licensed ISFSI on a site consisting of 820 acres of trust land on the northwest corner of the reservation. The first lease would be for an initial term of 25 years, with PFS having the irrevocable option to renew for an additional term of 25 years. PFS would pay the Band rent and other costs throughout the term of the lease.

³NRC Materials License No. SNM-2513, Docket No. 72-22.

⁴ See FEIS Response to Comments G.3.2.1.

On May 23, 1997, the Superintendent of the BIA Uintah and Ouray Agency (the BIA agency with jurisdiction over the Band) signed a “conditional approval” of the first lease that would allow PFS to begin ISFSI construction after the Secretary of the Interior certified that the following conditions were met:

1. The NRC and the BIA complete the EIS;
2. The EIS is issued;
3. The NRC issues its license; and
4. The proposed lease is modified to incorporate mitigation measures identified in the ROD, if any.

In January 2002, the Band and PFS entered into a Second Amended and Restated Lease (“second lease”). The BIA has taken no action to approve or disapprove the second lease. The FEIS analysis is based on the terms of the first lease, but the current relationship between PFS and the Band is governed by the second lease. The material terms of the two leases are essentially the same. Therefore, except for the discussion below concerning the effect of the BIA’s 1991 conditional approval policy on the first lease, all of the statements in this ROD concerning the “first lease” or the “second lease” apply equally to both, and for clarity we refer to them collectively as the “proposed lease.”

Before the end of the licensed life of the proposed ISFSI (a maximum of 40 years), the NRC believes SNF would be shipped to a permanent geologic repository (currently proposed for Yucca Mountain in the state of Nevada) or back to the utility

operators from which it came for storage at their NRC-licensed sites.⁵ Under the NRC license and the proposed lease, upon termination of the lease, or upon termination of the license, whichever comes first, PFS would be responsible for complete radiological and non-radiological decommissioning of the ISFSI.

In letters dated May 17, 2006, and April 21, 2006, to James E. Cason, Associate Deputy Secretary of the Interior, the Band has asked that the Department of the Interior take immediate action on the proposed lease. The Band has also made numerous phone calls to Department officials demanding immediate action.

The Final EIS

Construction and operation of the proposed ISFSI would require the following actions by four different federal agencies:

- NRC issuance to PFS of a license to receive, transfer, and possess SNF. This is required under the Atomic Energy Act and the Nuclear Waste Policy Act for any facility of this type.
- BIA approval of a business lease for the proposed facility on tribal trust land. This is required under 25 USC 415 because the proposed facility would be on the reservation.
- BLM approval of a PFS right-of-way (ROW) application to construct either:
 - a new rail spur (off of the interstate rail line) from Skunk Ridge along the base of the Cedar Mountains on the western side of Skull Valley to the ISFSI, or

⁵ See FEIS Response to Comments G.3.2.1.

- an Intermodal Transfer Facility (ITF) near Timpie, Utah (to transfer the incoming SNF from the interstate rail line to heavy-haul trucks for transport down Skull Valley Road to the ISFSI).⁶

These approvals would be required under the Federal Land Policy and Management Act because PFS's proposed transportation options would cross federal land controlled by the BLM.

- STB approval of the proposed new rail spur. This approval is required for construction of any new rail line under 49 U.S.C. 10901.

To assess under NEPA the impacts of the full range of possible federal approvals and alternatives on the quality of the human environment, the four agencies could have prepared four separate EISs, one for each agency. However, following the policy expressed in the Council on Environmental Quality regulations that NEPA review is intended to reduce paperwork and eliminate duplication,⁷ the four agencies decided to prepare one EIS and created alternatives for analysis in the FEIS that combined the four approvals in different ways, as follows:

Alternative	Description in FEIS	Federal Approvals Analyzed as part of Alternative
Proposed Action -- Alternative 1 (designated in the FEIS as the preferred alternative)	Construction and operation of the proposed ISFSI at the proposed location (Site A) on the Reservation and the new rail spur.	NRC—issue license BIA—approve lease BLM—approve rail spur STB—approve rail spur
Alternative 2:	Construction and operation of the proposed ISFSI at an	NRC—issue license for Site B

⁶ The BLM approval would be only for construction and operation of the ITF; there would be no federal approval necessary for the transportation of the SNF down Skull Valley Road.

⁷ 40 C.F.R. §§ 1500.2(b) and 1500.4.

	alternative location (Site B) on the Reservation, with the rail spur as described under alternative 1.	BIA—approve lease, conditioned on change to Site B BLM—approve rail spur STB—approve rail spur
Alternative 3	Construction and operation of the proposed ISFSI at Site A, and construction and operation of the new ITF with the use of heavy-haul vehicles to move SNF down the existing Skull Valley Road.	NRC—issue license BIA—approve lease BLM—approve ITF STB—no federal action
Alternative 4:	Construction and operation of the proposed ISFSI at Site B, with the same ITF as described under alternative 3.	NRC—issue license for Site B BIA—approve lease, conditioned on change to Site B BLM—approve ITF STB—no federal action
Wyoming Alternative	Construction and operation of the proposed ISFSI in Fremont County, Wyoming	NRC—analysis required under NRC NEPA procedures to determine if another site is obviously superior to the proposed site. BIA—no federal action (not analyzed as a reasonable alternative because of the government-to-government relationship with the Band) BLM—no federal action STB—no federal action
No Action Alternative:	PFS would not construct or operate the proposed ISFSI	NRC—disapprove license BIA—disapprove lease BLM—disapprove rail spur and ITF STB—disapprove rail spur

Even though the four agencies analyzed the alternatives as a whole in the FEIS, the intent of the agencies was that all of the decisions would be independently justified and that, generally, one agency's action would not prejudice or foreclose the others, consistent with the Council on Environmental Quality regulations at 40 C.F.R. § 1506.1. The agencies provided in the FEIS that each agency will have the full range of decisions available to it by specifying that the NRC would make its licensing decision first, followed, if the license is issued, by BIA's decision on the lease (this ROD), followed, if the license and the lease are approved, by the BLM and STB decisions.⁸ Thus, even if one agency chose the Proposed Action or another action alternative, any of the other agencies in the process could still choose the No Action alternative. Although, as noted below, that order has changed slightly since its contemplation in the FEIS, none of the decisions by other agencies have prejudiced the BIA's alternatives, and the BIA still retains full discretion to approve or disapprove the proposed lease.

Under 40 C.F.R. § 1505.2, an agency must identify in its ROD the alternative it considers to be the environmentally preferable alternative. All of the action alternatives analyzed in the FEIS have some environmental impacts from construction and operation of the ISFSI. The BIA considers the environmentally preferable alternative to be the no action alternative. The potential environmental impacts of constructing and operating the proposed ISFSI on the Reservation would not occur under this alternative. Positive economic benefits from tax revenues, local payroll, and other expenditures would not be

⁸ See, e.g., Section 9.4.3 of the FEIS. The agencies agreed upon this order because certain decisions would render other decisions moot. First, because issuance of the NRC license was a condition of the BIA lease approval, if NRC decided to not issue the license, BIA's action would be moot. Similarly, if BIA were to disapprove the lease, there would be no need for the rail spur or the ITF, so BLM's and STB's decisions would be moot. This articulated order is not binding, however.

available to the Band, but the Band would be free to pursue other uses and economic development opportunities for its land.

Status of Other Federal Actions

Since the issuance of the FEIS in December, 2001, several of the federal actions described above have occurred or become moot. As noted above, on February 21, 2006, the NRC issued a license to PFS to receive, transfer, and store SNF on the Reservation. The license is very specific, limiting not only the capacity and other operational aspects of the facility, but also the location of the facility to the site analyzed in the FEIS as "Site A" (which is also the site designated in the proposed lease). Thus, if the BIA were to select the area analyzed as Site B in the FEIS, this selection would require the Band and PFS to amend the proposed lease (as noted in the FEIS) and require PFS to apply for, and the NRC to approve, a modification to the license.

Furthermore, in Section 384 of Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006, Congress created the Cedar Mountain Wilderness Area in Tooele County, Utah, through which a portion of the proposed rail spur would be built. In the legislation, Congress specifically withdrew the Cedar Mountain Wilderness Area from "all forms of entry, appropriation, or disposal under the public land laws." STB and BLM approval of the PFS applications regarding the proposed rail spur are therefore precluded by this legislation.

Finally, concurrent with this ROD, BLM is issuing a ROD disapproving the PFS application for the ROW for the proposed ITF and rail spur. Therefore, if BIA were to approve the proposed lease, PFS would have to find some other method for transporting

SNF to the proposed facility. In the absence of a proposal from PFS for an alternative transportation system, BIA cannot predict whether that alternative system would require a federal action and NEPA review.

The Scope of the BIA Decision

Since the other federal actions are complete or moot, the sole remaining agency action is the Secretary of the Interior's approval or disapproval of the proposed lease. As noted above, the Superintendent of the Uintah and Ouray Agency conditionally approved the proposed lease in May 1997. The Secretary's decision in this ROD is not constrained by that conditional approval.

The Conditional Approval was outside the Scope of the Superintendent's Authority.

On August 28, 1991, the Assistant Secretary-Indian Affairs (AS-IA) issued a memorandum to all Area Directors with the subject line: "Conditional Lease Restriction." This memorandum specifically instructs employees that there will be no conditional approval of leases for waste facilities in the future.⁹ This policy was still in effect on the date the Superintendent conditionally approved the proposed lease.

⁹ As the August 28, 1991 AS-IA memo is largely relevant to central issues in this ROD the brief memo is stated herein in its entirety:

It has come to my attention that conditional lease approvals have been granted for proposed waste facilities in the past. The potential environmental impacts of these projects result in intense public and tribal attention which demand that the Bureau of Indian Affairs (BIA) act objectively during the review of the leases for these types of activities.

The most public of these processes is the preparation of the Environmental Impact Statement under the National Environmental Policy Act (NEPA), which must be completed before any decision regarding the lease can be made. While I have no doubt that all BIA officers intend to fully comply with our obligations under NEPA, the conditional approval of a lease for such a land disruptive activity may create the appearance that some of these obligations are not taken seriously.

Therefore, to help ensure that BIA is not only acting in an objective manner but is perceived as acting in an objective manner, there will be no conditional approvals for waste facilities in the future.

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Therefore, to help ensure that BIA is not only acting in an objective manner but is perceived as acting in an objective manner, there will be no conditional approvals for waste facilities in the future.

The Secretary of the Interior has authority to approve leases under the Indian Long-Term Leasing Act.¹⁰ The Secretary has the authority to manage Indian Affairs and to delegate that authority.¹¹ This authority to delegate allows subordinate officers to make determinations and issue policies in accordance with laws and implementing regulations prescribed by the Secretary. Considerable deference is accorded to the Secretary's construction of a statutory scheme that he is entrusted to administer.¹² Though the Superintendent had delegated authority to approve or disapprove leases, including waste facilities leases, the Superintendent acted beyond the scope of his authority by *conditionally* approving the 1997 lease in violation of BIA policy.

The Secretary is not bound by the Superintendent's 1997 conditional approval of the proposed lease. The 1991 policy removed delegated authority from all officers to conditionally approve waste facility leases.¹³ The Superintendent acted outside the scope of his delegated authority and in violation of BIA policy when he conditionally approved the 1997 lease. The Superintendent did not have authority or delegation to act contrary to BIA policy,¹⁴ and the Secretary is not bound by the *ultra vires* acts of his officers.¹⁵

¹⁰ 25 U.S.C. § 415. *See also*, 25 CFR § 162 et. seq. (regulations implementing Section 415).

¹¹ 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of Interior, and agreeably to such regulations and the President may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations.") *See also*, 25 USC § 1(a).

¹² *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹³ 25 U.S.C. § 1a states in pertinent part. "The Secretary or the Commissioner, as the case may be, may at any time revoke the whole or any part of a delegation made pursuant to this Act."

¹⁴ See Department Manual at 200 DM 1.8 Exercise of Authority:

An officer or employee who is delegated or redelegated authority must exercise it in conformity with any requirements that the person making the delegation would be called upon to observe.

The Conditional Approval Was an Expression of Intent and Not Final BIA Approval.

The Superintendent's action on the proposed lease was not a final action for the Department of the Interior,¹⁶ and the Secretary may now review it *de novo*. The four conditions in the proposed lease require more than ministerial acknowledgment by the Secretary. They are essential components of the body of information the Secretary must consider in order to make an informed decision to approve or disapprove the proposed lease.¹⁷ The content of the NRC license informs the Secretary's statutory consideration

Delegated authority must be exercised in accordance with relevant policies, standards, programs, organization and budgetary limitations, and administrative instructions prescribed by officials of the Office of the Secretary or bureau.

¹⁵ See *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (holding that the government is not bound when its agent enters into an agreement that falls outside the agent's Congressionally delegated authority.); *United States v. Stewart*, 311 US 60, 70 (1940) (The Government is not bound by the unauthorized acts of its agent even if within the scope of the agent's apparent authority.); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968) ("agent of the government must act within the bounds of their authority; and one who deals with them assumes the risk that they are so acting."); *Saulque v. U.S.*, 663 F.2d 968, 975 (9th Cir. 1981); *Laguna Gatuna Inc., v. United States* 50 Fed.Cl. 336, 342 (2001) ("The federal government will not be held liable for acts of its agents which are ultra vires.")

¹⁶ See *Abby Bullcreek et. al. v. Western Regional Director, Bureau of Indian Affairs*, 40 IBIA 196 discussing this proposed lease:

... By now it is well-established that BIA's approval of the lease was conditional, did not constitute final approval of the proposed storage facility, and did not authorize PFS to take possession or commence construction of the facility. See *Utah v. United States*, 210 F.3d 1193, 1195, (Superintendent conditionally approved the lease); *Utah* 32 IBIA at 170 n.1, (BIA's decision to approve the lease was conditional, and not final). It is entirely conceivable that no action at all may be taken in the future to store spent nuclear fuel on the Band's reservation, because no construction or operation of the facility can commence without further BIA evaluation to ensure that the conditions set forth in the lease have been met. If one or more of the requisite conditions are not met, the Secretary will not issue the necessary certification which, in effect, gives final approval to the lease, and the facility will never be constructed. See generally *Hayes v. Anadarko Area Director*, 25 IBIA 50 (1993) (appeal dismissed as premature when no final determination had been made by BIA). Appellants have not suffered, and may never suffer, any concrete adverse effects.

¹⁷ Indeed, the Department Manual at 516 DM 5 provides "supplementary instructions for implementing those portions of the CEQ regulations pertaining to Decision Making. See 516 DM 5.3 D-F:

of health and safety,¹⁸ and the completion and consideration of the EIS is not only a statutory prerequisite to making a decision under NEPA,¹⁹ but is also the basis of his analysis of environmental impacts under the leasing statute.²⁰

Congress declared in NEPA that the policy of the federal government is to “use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”²¹ To carry out that policy, Congress instructed federal agencies that “the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter”²² (In that same section, Congress also imposed the requirement for environmental impact statements.) In one of the first NEPA cases, the Court of Appeals for the District of Columbia Circuit noted that:

D. Relevant environmental documents, comments, and responses will accompany proposals through existing review processes so that Departmental officials use them in making decisions.

E. The decision maker will consider the environmental impacts of the alternatives described in any relevant environmental document and the range of these alternatives must encompass the alternatives considered by the decision maker.

F. To the extent practicable, the decision maker will consider other substantive and legal obligations beyond the immediate context of the proposed action.

¹⁸ Section 415(a), *supra*.

¹⁹ 42 USC 4332(2)(c)

²⁰ *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

²¹ 42 U.S.C. § 4331(a).

²² 42 U.S.C. § 4332(1).

NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. [Each federal agency] is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [federal] agencies to *consider* environmental issues just as they consider other matters within their mandates.²³

The BIA must consider environmental issues concerning the proposed lease. This consideration, to be consistent with the spirit and letter of NEPA, must extend to all of the effects of the proposed lease on the quality of the human environment, and must include the possibility of disapproval.²⁴

The Statutory and Regulatory Standards for Approval of Leases

Under the Indian Long-Term Leasing Act, 25 U.S.C. § 415(a) (Section 415), the Indian owner of trust or restricted land may lease the land “with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes.” Leases made pursuant to this section can, in most cases, last for a term of 25 years, subject to renewal for one additional term of 25 years (50 years total), and are subject to “such terms and regulations as may be prescribed by the Secretary of the Interior.”

In 1970 Congress amended Section 415 to require the Secretary, “prior to approval of any lease or extension of an existing lease pursuant to this section,” to “first

²³ *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis in original).

²⁴ *Id.*, at 1114 (“[The alternatives] requirement, like the “detailed statement” requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.”)

satisfy himself that adequate consideration has been given (emphasis added)” to five specific factors:

1. the relationship between the use of the leased lands and the use of neighboring lands;
2. the height, quality, and safety of any structures or other facilities to be constructed on such lands;
3. the availability of police and fire protection and other services;
4. the availability of judicial forums for all criminal and civil causes arising on the leased lands; and
5. the effect on the environment of the uses to which the leased lands will be subject.

Numerous Federal Courts have interpreted this statute. While “there are provisions in the statute pertaining to the approval process which require that certain steps be taken by the Secretary before any decision can be made,” the Secretary “[is] not subject to any specific, mandatory directives derived from regulations or statutes, and all decisions regarding [a lease are] subject to the Secretary’s subjective discretion.”²⁵ The 1970 amendments to Section 415 allow the Secretary broad discretion in reviewing leases. The statute directs the Secretary to “satisfy himself that adequate consideration has been given” to these factors, but does not “give any guidance whatsoever as to what the Secretary should do in that regard.” Consequently, the “statute allows wide judgment

²⁵ *Webster v. United States*, 823 F. Supp. 1544, 1549-50 (D. Mont. 1992).

on the part of the Secretary to determine when he is satisfied, what constitutes "adequate consideration" and who will be responsible for giving "adequate consideration."²⁶

However, Congress did not grant the Secretary limitless discretion in deciding whether to approve or disapprove leases under Section 415. Aside from the statute's mandate that the Secretary consider the five enumerated factors when making a decision, courts have held that Secretarial decisions under Section 415 must conform to the fiduciary standard normally placed upon the United States when acting as trustee for the Indians. By "Congress' having placed effective control over commercial leasing of allotted lands in the Secretary of the Interior [under Section 415], which must be exercised for their benefit according to the implementing regulations, the government has assumed an enforceable fiduciary obligation to Indian [landowners] respecting commercial leasing."²⁷ "The Secretary's actions will be analyzed not merely under an abuse of discretion standard, but under the more stringent standards demanded of a fiduciary," which includes a duty to administer the trust exercising "such care and skill as a man of *ordinary prudence would exercise in dealing with his own property* (emphasis added)."²⁸

²⁶ *Id.*

²⁷ *Brown v. U.S.*, 86 F.3d. 1554, 1556 (Fed. Cir. 1996).

²⁸ *Brown v. United States*, 42 Fed. Cl. 538, 563 (1998). See also, *Utah v. Department of the Interior*, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999) (In ruling on the standing of the State to intervene in the approval process of this proposed lease, the court stated "in approving or rejecting leases pursuant to § 415, the Secretary acts in a trust or fiduciary capacity. The legal attributes of such a relationship include a duty on the part of the trustee to act solely in the best interests of the trust beneficiary.").

Decision

Having concluded above that the BIA agency superintendent's 1997 action on the first lease is *ultra vires*, that the "conditional approval" of that lease does not bind the Secretary, and that the BIA to date has taken no action on the second lease, we now discuss why we have decided to disapprove the proposed lease and to choose the no action alternative.

Basis for Decision

The Secretary acknowledges the thoroughness of the NRC's inquiry into the nuclear safety aspects of the proposed ISFSI, and does not endeavor to second guess the methods or conclusions of the Commission that are by statute solely within its purview. The Secretary of the Interior's inquiry is fundamentally different from that of the Commission. As trustee-delegate, the Secretary has the complex task of weighing the long-term viability of the Skull Valley Goshute reservation as a homeland for the Band (and the implications for preservation of Tribal culture and life) against the benefits and risks from economic development activities proposed for property held in trust by the United States for the benefit of the Band. In making this inquiry, the Secretary is guided by the five factors enumerated by Congress in Section 415, by the additional guidance provided by the statute's implementing regulation at 25 CFR 162, and by the common law, which can inform our decisions as trustee-delegate.

We see nothing in the statute, regulations, or the common law that *requires* us to approve the proposed lease. We see our primary duty as trustee-delegate, under the law regarding this and other proposed leases, to be the protection of the trust *res* as a future

homeland and productive land base for the Band through the prudent exercise of informed discretion after considering all relevant factors.

We are cognizant of and have carefully considered the economic impact to the Band in making this decision. We are aware of the income the proposed lease would provide the Band, and that economic benefit has weighed heavily in our consideration of the proposed lease. Upon weighing the benefits to the Band against the significant uncertainties and other factors discussed below, we conclude that it is not consistent with the conduct expected of a prudent trustee to approve a proposed lease that promotes storing SNF on the reservation. In reaching this conclusion, we emphasize that the decision to disapprove the proposed lease and choose the no action alternative in this ROD does not foreclose other economic development activities that the Band could pursue.

The decision to disapprove the proposed lease is the result of our concern that adequate consideration has not been given to the factors the Secretary is required to consider under the statute; that the PFS proposal removes the Secretary's ability to effectively police the lessee's activities on the trust property as contemplated by the regulation; and that years-long delays in construction of a permanent SNF repository, reflected in the Waste Confidence Decisions of the NRC, provides no firm basis to determine when and under what circumstances SNF might be taken away from trust land if the proposed ISFSI is built.

Adequacy of environmental analysis.

Two events have occurred in the immediate vicinity of the Goshute reservation since the PFS EIS was completed in December, 2001. First, in 2004, the Band began accepting baled municipal solid waste from Salt Lake City and other Utah communities into a Tekoi balefill landfill operation built on Reservation land leased to the CR Group, LLC, with the approval of the BIA.²⁹ Then, in 2006, the U.S. Congress created the Cedar Mountain Wilderness Area near the Goshute Reservation in Tooele County.³⁰ Neither of these events, of course, was analyzed in December, 2001 PFS EIS.

The landfill generates about 130-160 heavy truck trips per day to the Reservation along the rural, two-lane Skull Valley Road. The proposed PFS facility would contribute additional traffic on Skull Valley Road in the form of slow-moving, 150 foot-long heavy haul trucks traveling with a frequency of about two per week. Each heavy-haul round trip to the ISFSI would take about four hours. Road wear and tear under such extraordinary volume and loads, interference with the truck traffic destined for the landfill, and other environmental impacts have not been analyzed and therefore are not available to the Secretary in making a decision on the proposed lease.

Impacts on the Cedar Mountain Wilderness Area, whether from construction and operation of the ISFSI, transportation of SNF to the Goshute site, or truck traffic to and from the landfill, have also not been analyzed. While the landfill EIS did include a cumulative impacts analysis of the projected impacts of truck traffic associated with the

²⁹ The BIA published a Record of Decision on balefill operation EIS (the "balefill EIS") for this activity in May, 2004.

³⁰ P.L. 109-163

PFS facility, both the landfill and PFS traffic were *estimated* at the time that analysis was completed. The impacts on the wilderness area from the proposed ISFSI, in combination with now quantifiable *actual* impacts from existing activities such as the landfill, have not been adequately analyzed and therefore are not available to inform the Secretary's decision regarding the proposed lease.

Further, the PFS EIS analyzes in detail the transport of SNF *to* the Goshute reservation, but fails to adequately address the impacts of transportation of SNF *away from* the PFS facility to the permanent geological repository or back to the utility operators. In fact, the first page of the PFS EIS describes the focus of the document as evaluating "...the potential environmental effects of the ISFSI proposed by PFS, including construction and operation of new transportation facilities that would provide access *to* the proposed ISFSI ... (emphasis added)"³¹ The document contains many references to transport to the Goshute Reservation,³² but very few that discuss the effects of transport away from the site before the end of the license term or upon completion of a permanent repository at Yucca Mountain.

Finally, recent federal case law creates significant uncertainty surrounding the adequacy of analysis in the PFS EIS. In *San Luis Obispo Mothers for Peace, et al. v. United States*,³³ the Ninth Circuit Court of Appeals reversed an NRC decision to grant a

³¹ PFS EIS, Section 1.1, p1-1, December, 2001

³² See, e.g., sections 1.5.3.1 (p. 1-17); 2.1.2.1 (p. 2-18); 2.2.4.2 (p. 2-40, 2-43, 2-47); 5 (p. 5-1); 5.4 (p. 5-15); 5.6.2 (p. 5-34); 5.7.2 (p. 5-39); 5.7.2.2 (p. 5-42); 5.7.2.3 (p. 5-44); 5.7.2.4 (p. 5-49); 5.7.2.5 (p. 5-51); 5.7.2.6 (p. 5-53); 5.7.2.9 (p. 5-58, 5-60, 5-61, 5-62); 5.8.3.2 (p. 5-71); 5.8.4 (p. 5-72); 6 (p. 6-1); 6.1.4.3 (p. 6-10); 6.1.5.3 (p. 6-12, 6-13, 6-14); 6.1.8.3 (p. 6-20); 9.3 (p. 9-2); 9.4.3 (p. 9-16); Appendix A Scoping Report (p. 12); Appendix A Supplemental Scoping Report (p. 13); Appendix C (p. C-1); Appendix D (p. D-20); and Appendix G (p. G-9).

³³ No.03-74628, 2006 U.S. App. Lexis 13617

license to the owner of the Diablo Canyon nuclear power plant in San Luis Obispo, California, to construct and operate an SNF dry cask storage facility technically similar to the one PFS proposes. In internal proceedings that preceded issuing the Diablo Canyon license, the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks. NRC based its decision on four factors it used earlier in considering and rejecting the State of Utah's contention that the environmental effects of terrorism should be analyzed in the PFS EIS.³⁴ The Ninth Circuit reviewed each factor for reasonableness and concluded that, individually or collectively, they do not support the NRC's decision not to consider the environmental effects of a terrorist attack in the Diablo Canyon EA.

The court's sweeping rejection of the same factors NRC relied on in rejecting the State of Utah's contention in the PFS licensing proceedings leaves us distinctly unsatisfied at best that the effects of a terrorist-initiated event have been given adequate consideration, and prudent cognizance of the uncertainty surrounding this type of analysis highlighted by the *San Luis Obispo* decision counsels disapproval of the proposed lease and selection of the no action alternative.

Relationship of leased lands to neighboring lands.

As noted above, the BLM had to decide whether to approve or disapprove two ROW applications submitted by PFS. The first of these applications would have supported construction of a rail spur across public land to the ISFSI on the Reservation;

³⁴ The four factors are: (1) the possibility of terrorist attack is too far removed from the natural or expected consequences of agency action; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a "worst case" analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues.

the second would have supported construction of an ITF on BLM land at which SNF shipping canisters would be transferred to heavy haul trucks for the trip down Skull Valley Road to the ISFSI. Citing many of the same concerns about the completeness of the PFS EIS that BIA has identified, BLM has decided to disapprove both ROW applications, concluding that intervening events not analyzed in the EIS compel it to determine that the ROWs are not in the public interest.

In reviewing the relationship of the use of leased lands to the neighboring lands, as Section 415 instructs that we must, we are influenced by the consequences of BLM's determination that the ROWs are not in the public interest. After NRC issued its license restricting construction of the ISFSI to Site A (foreclosing analyzed alternatives that involve construction of the ISFSI on Site B), and after Congress created the Cedar Mountain Wilderness Area (effectively foreclosing alternatives that involved rail spur transport into the Reservation), only alternative 3 - construction on Site A and transport by rail and truck via the ITF - among the alternatives analyzed in the PFS EIS remained viable. BLM's determination that the ITF ROW is not in the public interest has effectively eliminated the last viable analyzed alternative for transportation of SNF to the Reservation, and PFS has formally proposed no additional alternative method of transport. The BLM determination that ROWs across public lands that would support an essential component of the ISFSI - transportation corridors - are not in the public interest, we are not satisfied that construction and operation of the facility is compatible with neighboring lands.

Availability of Police Protection.

The NRC has given exhaustive consideration to *security* at the proposed ISFSI. The Secretary of the Interior, however, is responsible for *law enforcement* on the Goshute Reservation and throughout all of Indian Country. The BIA, the Band, and the Tooele County Sheriff's Department do not have resources to provide adequate law enforcement support for the proposed ISFSI. The Band does not have a P.L. 93-638 contract for law enforcement with the BIA.³⁵ In the absence of a contract, the BIA Office of Law Enforcement Services (OLES), through its District III in Phoenix, Arizona has primary law enforcement jurisdiction on the Goshute Reservation. Efforts to staff the Goshute Reservation have consistently proven unsuccessful, and the BIA currently has no officers assigned there. The closest BIA Law Enforcement Officers are assigned to the BIA's Uintah and Ouray Agency in Ft. Duchesne, Utah, approximately 4 ½ hours drive from the Goshute Reservation.

The Tooele County Sheriff's Department has jurisdiction within the county surrounding the Reservation. The County Sheriff has no jurisdiction over crimes committed by or against Indians in Indian country because Utah is not a "Public Law 280" state.³⁶ There is currently no reimbursable agreement between the BIA and the County under which the latter would provide law enforcement services to the Reservation, and the County Sheriff's Deputies are not currently cross-deputized by the BIA and therefore have no jurisdiction over the Indian residents on the Reservation. The

³⁵ Under P.L. 93-638, the Indian Self Determination and Education Assistance Act, 25 USC 450 *et seq.*, the Secretary can contract with Tribes that want to provide for their members the services the BIA normally provides. With the contract come the funding the Secretary would have used to provide such services.

³⁶ See 18 USC 1151

Tooele County Sheriff's Department has a maximum normal shift manning of five Deputies to cover the 7000 square-mile county; response times to incidents on the Reservation could vary greatly depending on the location of Deputies in this large area. Even if the appropriate agreements were in place, Tooele County could not provide the round-the-clock law enforcement services required due to additional traffic and other activities on the Reservation as a result of the proposed ISFSI.

As trustee-delegate for approximately 56 million acres of trust and restricted lands, the Secretary of the Interior is funded to train and equip 400 BIA law enforcement officer positions. Law enforcement resources in Indian Country are spread extremely thin; on some Reservations the BIA can field only one trained officer for many hundreds of square miles. BIA OLES managers estimate that seven full-time law enforcement officers and two support staff would be required to adequately provide law enforcement services to the Reservation if the ISFSI were built. With limited resources to meet law enforcement responsibilities throughout the rest of Indian Country, it would be imprudent to approve leases that allow an activity that the Secretary does not have the resources to support.

The Secretary has no specialized resources with which to monitor the tenant's activities.

The highly technical nature of the proposed ISFSI effectively eliminates the Secretary's ability to inspect the tenant's activities and enforce the lease. The Secretary retains the authority to enter the leased premises "... to protect the interests of the Indian landowners and ensure that the tenant is in compliance with the operating requirements of

the lease.”³⁷ The Secretary may also, after consultation with the Band, cancel a lease for non-compliance and order the tenant to vacate.³⁸ The Secretary controls no independent specialized technical resources of the type required to assess compliance of so specialized a tenant as PFS. The BIA employs no nuclear scientists or technicians nor other specialty skills that would be required to adequately monitor the lease. An order to vacate issued to PFS would have no practical effect because of the extensive infrastructure and investment at the facility, and the logistics, expense, and national consequences of the displacement of SNF stored there. The ISFSI, once constructed, has qualities of permanence that render the trustee-delegate’s ultimate regulatory means of protecting the Indian landowner unworkable, and it is not prudent to approve a lease that has this consequence.

The Secretary cannot ascertain when SNF might leave trust land.

Despite the efforts of the Department of Energy (DOE) toward establishing a permanent geologic repository for SNF at Yucca Mountain, Nevada, the timing of licensing and constructing that facility remains uncertain. Prudent cognizance of that uncertainty counsels disapproval of the proposed lease.

The Nuclear Waste Policy Act of 1982 (NWPA), as amended,³⁹ established the process for locating, constructing, operating and closing a national permanent geologic repository for high level radioactive waste and SNF. Under NWPA, the DOE is responsible for obtaining a license from the NRC, then constructing and operating the

³⁷ 25 CFR 162.617

³⁸ 25 CFR 162.619

³⁹ 42 U.S.C. 10101 *et seq.*

repository.⁴⁰ Following the requirements of the NWPA, the DOE Secretary recommended Yucca Mountain to the President as the site of the nation's permanent SNF disposal facility. The President then recommended Yucca Mountain to the Congress, which approved that site by joint resolution in 2002.⁴¹ While Yucca Mountain is clearly the intended site of the permanent repository, the date Yucca Mountain will begin receiving SNF remains uncertain.

That uncertainty is enshrined in the public record in the NRC's Waste Confidence Decisions. In 1984, two years after Congress passed the NWPA, NRC issued its first Waste Confidence Decision.⁴² The purpose of that decision was to "assess its degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when such disposal would be available, and whether such wastes can be safely stored until they are safely disposed of."⁴³ After a hearing and notice and comment rulemaking, the NRC issued five findings,⁴⁴ including a finding that one or more permanent disposal repositories for such waste would be available by the years 2007 – 2009. Acknowledging that its conclusions on waste confidence could change due to any number of unexpected intervening events, the NRC committed to review its Decision every five years until a permanent repository for high-level radioactive waste and SNF became available.

⁴⁰ 42 U.S.C. 2011 *et seq.*

⁴¹ See Yucca Mountain Development Act, Pub. L. No. 107-200, 116 Stat. 735 (2002)

⁴² 49 FR 34658. The 1984 Waste Confidence Decision was issued as the result of a remand to the NRC from the U.S. Court of Appeals for the D.C. Circuit after an appeal from NRC's 1977 decision to deny a petition for rulemaking to determine whether radioactive wastes generated in nuclear power reactors can be disposed of without undue risk to public health and safety and to refrain from granting pending or future requests for reactor operating licenses until such finding of safety was made.

⁴³ 49 FR 38472

⁴⁴ These five findings were codified, after issuance of a final rule, at 10 CFR 51.23.

The NRC issued its next Waste Confidence Decision in 1990, affirming or changing only slightly four of the five findings from the 1984 Decision. Regarding the likelihood and timing of a permanent geological repository, however, the NRC significantly revised its earlier assessment that such a facility would be available in the years 2007 - 2009:

The Commission finds reasonable assurance that at least one mined geologic repository will be available within *the first quarter of the 21st century...* (emphasis added)⁴⁵

The Commission also extended the cycle of review from every five years to every ten years. The rationale for this extension was that "... predictions of repository availability are best expressed in terms of *decades* rather than years (emphasis added)."⁴⁶

The Commission's 1999 Waste Confidence Decision restated the 1990 prediction that a permanent facility might be available sometime within the first quarter of the 21st Century, but cited no compelling additional support for that contention.⁴⁷

As of the date of this ROD, fully seven years after the 1999 Waste Confidence Decision predictions, the DOE has not submitted a license application for the permanent facility to the NRC.

⁴⁵ 55 FR 38474, Sep. 18, 1990

⁴⁶ *Id.*

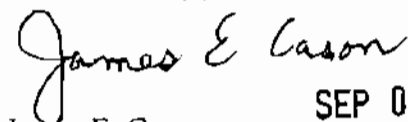
⁴⁷ 64 FR 68005, Dec. 6, 1999

A prudent trustee-delegate can derive no confidence from the public record. Construction of Yucca Mountain could be indefinitely delayed by any number of factors, including protracted litigation (after all, NRC acknowledges that “decades” are the most relevant unit of time for predicting the completion date). Current legal structures that prevent additional license renewals could be amended to provide for SNF storage at the proposed ISFSI beyond the term of the current license and authorized renewal period. This uncertainty concerning when the SNF might *leave* trust land, combined with the Secretary’s practical inability to remove or compel its removal once deposited on the reservation, counsel disapproval of the proposed lease.

Conclusion

For the reasons above, we disapprove the proposed lease and choose the no action alternative.

Because this decision is issued by the Associate Deputy Secretary of the Department of the Interior fulfilling the functions of the Assistant Secretary--Indian Affairs, it is the final action of the Department and effective immediately, under 25 C.F.R. § 2.20(c).


James E. Cason

SEP 07 2006

Associate Deputy Secretary

SEP 7 2006

Record of Decision
Addressing Right-of-Way Applications U 76985 and U 76986
To Transport Spent Nuclear Fuel
To the Reservation of the Skull Valley Band of Goshute Indians

The Decision

This record of decision sets forth the decision of the Bureau of Land Management (BLM), U.S. Department of the Interior (the Department), to adopt the no-action alternative as set forth in a comprehensive Environmental Impact Statement (EIS) prepared by the Nuclear Regulatory Commission (NRC), entitled Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah (December 2001). Spent nuclear fuel (SNF), the focus of the EIS, is the primary by-product from a nuclear reactor. The BLM was a cooperating agency in the preparation of this EIS, as were the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, and the U.S. Surface Transportation Board.

The effect of this decision is to reject applications U 76985 and U 76986 for right-of-way grants filed by Private Fuel Storage L.L.C. (PFS). The applications seek right-of-way grants under Title V of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1761, to transport SNF across public lands managed by the BLM. As proposed, the fuel would be transported from an existing Union Pacific railroad site to the Reservation of the Skull Valley Band (Band) of Goshute Indians in Tooele County, Utah. The fuel would be stored in above-ground canisters on the Reservation, awaiting eventual disposal at a permanent repository in Yucca Mountain, Nevada. Storage would occur approximately 50 miles from Salt Lake City.

Background

PFS is a limited liability company owned by eight U.S. electric power generating companies. These companies are: Entergy Corporation; Southern California Edison Company; Genoa FuelTech, Inc.; Indiana-Michigan Company (American Electric Power); Florida Power and Light Company; GPU Nuclear Corporation; Xcel Energy Inc.; and Southern Nuclear Operating Company.

PFS filed an application, dated June 20, 1997, with the NRC for a license to receive, transfer, and store SNF from commercial nuclear power plants at a privately-owned independent spent fuel storage installation (ISFSI) on the Goshute Reservation. Shortly before, on May 20, 1997, PFS entered a proposed lease with the Band to use Reservation lands for this purpose. The Superintendent, BIA, Uintah and Ouray Agency, conditionally approved this proposed lease on May 23, 1997.

On August 31, 1998, PFS filed application U 76985 with the BLM for a right-of-way grant authorizing PFS to construct and operate a rail line across public lands in Tooele County. The rail line would be used to transport sealed transportation casks of SNF to the proposed ISFSI, also known as the PFS Facility (PFSF), operated by PFS on the Goshute Reservation. On the same day, PFS filed application U 76986 with the BLM for a right-of-way grant authorizing PFS to construct an intermodal transfer facility (ITF) on 9 acres of public lands. The proponent PFS would use this area (later increased to 21 acres) to transfer SNF from rail cars to heavy-haul tractor/trailers, which would then transport SNF to the temporary storage site on the Goshute Reservation. PFS indicated in application U 76986 that its preferred approach was to transport SNF across public lands by rail. Both applications sought a right-of-way grant for a term of 50 years.

On October 5, 1999, President Clinton signed the National Defense Authorization Act for Fiscal Year 2000 (113 Stat. 512). This act, also known as Public Law 106-65, directed the Secretary of Defense to conduct a study to evaluate the impact upon military training, testing, and operational readiness of any proposed changes in management of Utah national defense lands. Until this study and a report to Congress are made, the Secretary of the Interior may not proceed with the amendment of any individual resource management plan for Utah national defense lands. Utah national defense lands include lands described in right-of-way application U 76985.

On January 5, 2000, PFS applied for a license with the U.S. Surface Transportation Board to construct and operate a rail line to the PFSF (Finance Docket 33824).

A draft EIS was published in June 2000, and numerous comments were received by the agencies. 65 Fed. Reg. 39206 (June 23, 2000). A final EIS, dated December 2001, addressed the impacts expected to result from construction and operation of the PFSF, rail line, and ITF. The preferred alternative set forth in the EIS called for construction and operation of the PFSF on the Goshute Reservation. The SNF would be transported to the site by a rail line across BLM lands.

On January 6, 2006, after publication of the project's EIS in December 2001, President Bush signed Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006 (119 Stat. 3136). Section 384 of this Act designated certain lands as wilderness, to be known as the Cedar Mountain Wilderness Area, and added these lands to the National Wilderness Preservation System. The Cedar Mountain Wilderness Area includes lands described in PFS's application U 76985 seeking a right-of-way for a rail line.

Additional comments were received by the BLM following its publication on February 7, 2006, of a Federal Register notice at 71 Fed. Reg. 6286 requesting comments on the two right-of-way applications then pending before the agency.

On February 21, 2006, the NRC issued Materials License Number SNM-2513 to PFS for the receipt, possession, storage, and transfer of spent fuel at the PFS facility located at

Site A on the Goshute Reservation (71 Fed. Reg. 10068 on Feb. 28, 2006). The license is for a term of 20 years, and the licensee may seek to renew it prior to its expiration. The license authorizes PFS to provide interim storage in a dry cask storage system for up to 40,000 metric tons of uranium contained in intact spent fuel, damaged fuel assemblies, and fuel debris. The dry cask storage system authorized for use is a site-specific version of the HI-STORM 100 system designed by Holtec International, Inc. PFS has indicated that it may seek to renew the license for 20 years (total of 40 years). A challenge to this license by the State of Utah is presently pending before the U.S. Court of Appeals, District of Columbia Circuit, in *Ohngo Gaudadeh Devia and State of Utah v. Nuclear Regulatory Commission and the United States of America*, Nos. 05-1419, 05-1420, and 06-1087.

With the issuance of Materials License Number SNM-2513 by the NRC, there remains for consideration by the Department of the Interior whether the BLM should grant or deny right-of-way applications U 76985 and U 76986, and whether the BIA should approve or disapprove the 1997 proposed lease entered by PFS and the Band. Although Federal Register notices advising of the availability of the draft EIS suggested that the BLM would await a decision by the BIA before acting, 65 Fed. Reg. 39174 (June 23, 2000) and 65 Fed. Reg. 39206 (June 23, 2000), these notices are not binding. The Band has asked the Department to proceed promptly; the BLM has received comments as a response to BLM's February 7, 2006, Federal Register notice; and the NRC has since issued its license. In response, the BLM concluded its review of the analysis so that a decision can be issued. It is the BLM's understanding that a BIA decision is also forthcoming.

The Alternatives

The proposed action is set forth as Alternative 1 in the EIS.

1. *Proposed Action – Alternative 1: Construction and operation of the proposed Private Fuel Storage Facility at the proposed location, Site A, on the Reservation, a new rail siding at Skunk Ridge, and a new rail line connecting the Skunk Ridge siding with Site A.*

Alternative 1 involves the construction and operation of the proposed PFSF at a site designated as Site A in the northwest corner of the Skull Valley Indian Reservation and a new rail line connecting the existing Union Pacific railroad to the site. The proposed PFSF would be designed to store a lifetime capacity of up to 40,000 metric tons of uranium (MTU) (44,000 tons) of SNF. The capacity of the proposed PFSF would be sufficient to store all the SNF from reactor sites owned by PFS members, as well as SNF from reactor sites that are not owned by PFS members.

Construction of the proposed PFSF would occur in three phases. Phase 1 construction, which would provide an operational facility, is planned to begin upon issuance of a license by the NRC, PFS's assurance of adequate funding, and approval of a proposed

lease between PFS and the Skull Valley Band. The maximum term of the proposed lease is 50 years. About one-fourth of the storage area for the proposed PFSF would be constructed during Phase 1, which would be completed in approximately 18 months. Another one-fourth would be completed during Phase 2, and the remaining portion constructed during Phase 3. The maximum amount of SNF that PFS could accept at the proposed PFSF over the term of the license and the proposed lease is 40,000 MTU. Once PFS had accepted 40,000 MTU of SNF, it could not accept any additional SNF shipments, even if it had begun to ship SNF off site.

SNF to be shipped to the proposed PFSF would be placed inside sealed metal canisters at commercial nuclear power plants. These canisters would then be placed inside NRC-certified steel shipping casks for transport by rail to the new rail siding at Skunk Ridge. Dedicated trains, stopping only for crew changes, refueling, and periodic inspections, would be used to transport SNF from the existing reactor sites to Skull Valley. PFS expects that it would receive one to two trains, each carrying 2 to 4 shipping casks, per week from the reactor sites. The number of loaded SNF canisters (inside shipping casks) is estimated to be between 100 and 200 annually. Each canister would contain approximately 10 MTU of SNF.

The nearest main rail line is approximately 39 km (24 miles) north of the proposed site. PFS's preferred option for transporting SNF from the existing Union Pacific main line railroad to the site is to build a new rail line to the site. The new rail line, and its associated rail siding, would connect to the existing Union Pacific main rail line at Skunk Ridge (near Low, Utah). The proposed right-of-way for the rail corridor would be 51 km (32 miles) long and 60 m (200 ft) wide. It would run to the proposed PFSF site through public lands administered by the BLM on the eastern side of the Cedar Mountains. Because these public lands are outside a transportation and utility corridor described in the BLM's Pony Express Resource Management Plan (RMP), an amendment to this RMP would be necessary before the BLM could issue a right-of-way.

Before the Pony Express RMP may be amended, however, the Department of Defense has certain reporting duties under the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65). As noted above, Section 2815(b) of this Act directs the Secretary of Defense to conduct a study to evaluate the impact upon military training, testing, and operational readiness of any proposed changes in land designation or management of the Utah national defense lands. Utah national defense lands are "public lands under the jurisdiction of the Bureau of Land Management in the State of Utah that are adjacent to or near the Utah Test and Training Range and Dugway Proving Ground or beneath the Military Operating Areas, Restricted Areas, and airspace that make up the Utah Test and Training Range." Section 2815(d) provides that "[u]ntil the Secretary of Defense submits to Congress a report containing the results of the study, the Secretary of the Interior may not proceed with the amendment of any individual resource management plan for Utah national defense lands, or any statewide environmental impact statement or statewide resource management plan amendment package for such lands, if the statewide environmental impact statement or statewide resource management plan amendment addresses wilderness characteristics or wilderness management issues affecting such

lands." The study required by section 2815 has not been completed, and no report has been submitted to Congress.

From the BLM's perspective, Alternative 1 involves the amendment of the Pony Express RMP and the issuance of a right-of-way grant authorizing the construction and operation of a new rail line across public lands. The route of the right-of-way is described in PFS's application U 76985.

At the proposed PFSF, a dry cask storage technology would be used. The sealed metal canisters containing the SNF would be unloaded from the shipping casks at the proposed PFSF, loaded into steel-and-concrete storage casks, and then placed on concrete pads for above-ground storage. The canister-based cask system for confining the SNF has been certified by NRC in accordance with NRC requirements (10 CFR Part 72). PFS anticipates storing as many as 4,000 sealed metal canisters inside individual storage casks, for a total maximum storage of 40,000 MTU of SNF.

By the end of the licensed life of the proposed PFSF and prior to the expiration of the proposed lease, it is expected that the SNF would have been shipped to a permanent repository. Service agreements (i.e., contracts) between PFS and companies storing SNF at the proposed PFSF will require that the utilities remove all SNF from the proposed PFSF by the time the PFS license is terminated and PFS has completed its licensing or regulatory obligations under the NRC license. The service agreement requirement to remove the SNF from the proposed PFSF is not dependent upon the availability of a permanent geological repository. Therefore, if the PFS license is terminated or revoked prior to the availability of a permanent geological repository, the reactor licensees storing SNF at PFSF would continue to retain responsibility for the fuel and must remove it from the proposed PFSF site before license termination.

At the end of its useful life (or upon termination of the proposed lease with the Band or termination of the NRC license, whichever comes first), the proposed PFSF would be closed. As a condition of the proposed lease with the Band and as required by NRC regulations, decommissioning of the proposed PFSF would be required prior to closure of the facility and termination of the NRC license. Although the exact nature of decommissioning cannot be predicted at this time, the principal activities involved in decommissioning would include:

- Removal of all remaining SNF from Skull Valley;
- Removal or disposition of all storage casks;
- Removal or disposition of the storage pads and crushed rock, at the option of the Band and the BIA; and
- Removal of the buildings and other improvements or their transfer to the Band, at the option of the Band and the BIA.

The objective of the radiological decommissioning would be to remove all radioactive materials having activities above the applicable NRC limits in order for the site to be released for unrestricted use. The SNF contained inside sealed metal canisters would be

transferred to licensed shipping casks for transportation away from Skull Valley. The proposed lease requires that the SNF be removed from the Reservation before the end of the lease term.

2. *Alternative 2: Construction and operation of the proposed PFSF at an alternative location, Site B, on the Reservation, with the same Skunk Ridge rail siding and rail line as described under Alternative 1.*

This alternative involves constructing the proposed PFSF at an alternative location, Site B, on the Reservation. This site is located about 800 m (0.5 mile) south of the proposed Site A and is similar in terms of its environmental characteristics to the proposed site. Under this alternative, a new rail line would be constructed across BLM lands from Skunk Ridge. The rail corridor through Skull Valley would be essentially identical to the one for the proposed action, but it would be about 1.6 km (1 mile) longer due to the slightly greater distance of Site B from the existing main rail line. For the BLM's decisional purposes, Alternative 2 involves the amendment of the Pony Express RMP and the issuance of a right-of-way grant authorizing the construction and operation of a new rail line across public lands. The route of the right-of-way is described in PFS's application U 76985.

3. *Alternative 3: Construction and operation of the proposed PFSF at Site A, and construction and operation of a new Intermodal Transfer Facility near Timpie, Utah, with the use of heavy-haul vehicles to move SNF down the existing Skull Valley Road.*

Under this alternative, the proposed PFSF would be constructed at Site A, but transportation of SNF from the existing Union Pacific main rail line to the site would be accomplished by heavy-haul tractor/trailers. An Intermodal Transfer Facility (ITF) and rail siding would be built on land managed by BLM at the existing main rail line near Timpie, Utah, to transfer SNF shipping casks from rail cars to the heavy-haul vehicles, which would then transport the SNF along the existing Skull Valley Road to the site. No rail line would be built under this alternative.

The ITF would occupy approximately 21 acres of BLM land 2 miles west of the intersection of I-80 and Skull Valley Road. It consists of three rail sidings, a new access road for heavy-haul vehicles, and a building with a crane for transferring SNF shipping casks from rail cars onto heavy-haul trailers. PFS has filed application U 76986 with BLM for a right-of-way grant authorizing use of this land. The ITF would occupy previously disturbed land lying between the existing Union Pacific Railroad and Interstate 80. The SNF would arrive at the ITF by rail using the Union Pacific rail line. The crane would load the fuel from a rail car onto a heavy-haul trailer, which would use the existing Skull Valley Road to carry the fuel south to the PFSF on the Goshute Reservation, a distance of approximately 26 miles. Skull Valley Road is an undivided, two-lane public road, one lane in each direction. The BLM issued a right-of-way (U 04240) for this road to the Utah State Road Commission on May 17, 1951. For the

BLM's decisional purposes, Alternative 3 involves the issuance of a right-of-way grant authorizing the use of public land for the ITF.

The EIS indicates that Alternative 3 was not selected as the preferred alternative because construction and use of the rail line would have advantages over the use of the ITF. The ITF requires the use of heavy-haul trailers traveling on Skull Valley Road at speeds not to exceed 20 miles per hour. Impacts to local traffic would be difficult to mitigate, impacts which could be entirely avoided by use of the rail line from Skunk Ridge (EIS at section 9.4.3 (p. 9-16)). Also, the ITF would involve additional doses of radiation incurred by workers transferring SNF shipping casks from rail cars to heavy-haul vehicles at the ITF. This additional dosage would also be avoided if the rail option were to be used instead of the ITF option (*Id.* at section 9.4.1.3 (p. 9-9)).

4. *Alternative 4: Construction and operation of the proposed PFSF at Site B, with the same ITF as described under Alternative 3.*

This alternative would be identical to Alternative 3 except that the proposed PFSF would be located at Site B on the Reservation rather than at Site A. The ITF and rail siding would be located near Timpie, and transport of SNF by heavy-haul vehicles would use Skull Valley Road. No rail corridor would be built under this alternative. As in Alternative 3, this alternative involves the issuance of a right-of-way grant authorizing use of the public lands for the ITF. PFS has filed right-of-way application U 76986 for use of BLM lands for the ITF.

5. *No Action Alternative*

Under the No Action alternative, no PFSF or transportation facilities would be built in Skull Valley. Under this alternative, no proposed lease would be approved by the BIA between PFS and the Band. For the BLM's decisional purposes, right-of-way applications U 76985 and U 76986 filed by PFS would each be denied. The Band would be free to pursue alternative uses for the land in the northwest corner of the Reservation.

The Wyoming Alternate Site

The proponent PFS identified a site in Fremont County, Wyoming, as an alternative, secondary site. This site is located north of Shoshoni, Wyoming, approximately 24 miles northeast of Riverton and 10 miles south of the Owl Creek Mountains. This site was not actively considered by PFS for the siting of a SNF storage facility, but it was evaluated in the EIS for comparison purposes, i.e., to determine whether it was obviously superior to the Skull Valley site selected by PFS. The Wyoming site is private land located adjacent to an existing railroad and requiring approximately one mile of new rail construction for access. NRC staff concluded that construction and operation of a SNF storage facility at the Wyoming site was not an obviously superior alternative to the proposed action. PFS has elected to pursue the leasing and development of only Site A on the Skull Valley Reservation.

Alternatives considered but not further addressed

A number of alternatives were considered in the EIS but not further addressed. These alternatives included: (1) a different, privately owned, away-from-reactor ISFSI; (2) shipment of SNF from reactor sites without sufficient storage space to reactor sites with additional storage capacity; (3) alternative sites that would, in effect, eliminate the need for the proposed PFSF; (4) alternative technologies available for an operational ISFSI; and (5) transportation options for moving SNF cross-country to the location of the proposed PFSF, as well as transportation options within Skull Valley. The first three of these items were eliminated from detailed evaluation because of the absence of any evidence that these options were actually viable, the unavailability of sufficient detail for evaluation, and the speculative nature of such options. The remaining items did not offer any obvious advantage over those technology and transportation alternatives identified for evaluation in the EIS and were eliminated from detailed evaluation.

Environmentally Preferable Alternative

The BLM considers the environmentally preferable alternative to be the No Action alternative. The potential impacts of constructing and operating the proposed PFSF and associated SNF transportation facilities in Skull Valley would not occur under this alternative. No rail line to the PFSF would be built, and no ITF would be constructed on BLM lands. Traffic on Skull Valley Road would not be increased by heavy-haul trailers carrying SNF. Positive economic benefits from tax revenues, local payroll, and other expenditures would not be available to the Band, but the Band would be free to pursue other uses for its land.

The Basis for the Decision

The BLM's decision is to adopt the No Action alternative, the effect of which is to deny right-of-way applications U 76985 and U 76986 filed by PFS.

Alternatives 1 and 2

Cedar Mountain Wilderness Area

On January 6, 2006, after publication of the project's EIS in December 2001, President Bush signed Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006 (119 Stat. 3136). Section 384 of this Act designated certain lands as wilderness, to be known as the Cedar Mountain Wilderness Area, and added these lands to the National Wilderness Preservation System. In addition, section 384 withdrew the Cedar Mountain Wilderness Area "from all forms of entry, appropriation, or disposal under the public land laws, from location, entry, and patent under the United States mining laws, and from disposition under all laws pertaining to mineral and geothermal leasing, and mineral materials, and all amendments to such laws." The Cedar Mountain Wilderness Area includes lands described in PFS's application U 76985 seeking a right-

of-way for a rail line. The effect of this wilderness designation is to preclude the BLM's issuance of a right-of-way grant authorizing a rail line through those lands designated as the Cedar Mountain Wilderness Area. As a practical matter, any rail line would be forced to halt at the boundary of the lands designated as the Cedar Mountain Wilderness Area.

The BLM's authority to issue a right-of-way grant for a rail line across the public lands is set forth in Title V of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1761. Section 501(a) of FLPMA provides in part: "The Secretary [of the Interior], with respect to the public lands and, the Secretary of Agriculture, with respect to lands within the National Forest System (*except in each case land designated as wilderness*), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for -- . . . roads, trails, highways, *railroads*, . . . or other means of transportation . . . (emphasis added)." Thus, section 501(a) expressly removes from the Secretary and his delegate, the BLM, the authority to issue a right-of-way grant for lands designated as wilderness. To issue a right-of-way grant in such a case would violate Section 501(a) of FLPMA. Because the BLM cannot issue a right-of-way grant for a necessary part of the lands described in PFS's application U 76985, Alternatives 1 and 2, both of which rely on the rail line described in application U 76985, have not been selected.

The BLM regulations support denial of application U 76985. Regulation 43 CFR 2804.26(a) states that the BLM may deny a right-of-way application if "(1) The proposed use is inconsistent with the purpose for which the BLM manages the public lands described in [the] application; (2) The proposed use would not be in the public interest; (3) [The applicant is] not qualified to hold a grant; (4) Issuing the grant would be inconsistent with [FLPMA], other laws, or these or other regulations; (5) [The applicant does] not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way; or (6) [The applicant does] not adequately comply with a deficiency notice . . ." Regulation 43 CFR 2804.26(a)(4) supports denial of application U 76985 because approval of this application would be inconsistent with Section 501(a) of FLPMA. Additional support for denial is set forth at 43 CFR 2802.10(a), which provides that BLM may grant rights-of-way "except when [a] statute, regulation, or public land order specifically excludes rights-of-way."

Even in the absence of the language in section 501(a) precluding the authorization of a right-of-way through wilderness lands, Alternatives 1 and 2 would not be an appropriate selection. Lands included in the National Wilderness Preservation System, such as the Cedar Mountain Wilderness Area, are to be administered by the Secretary for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness and so as to provide for the protection of these areas and their wilderness character (16 U.S.C. 1131(a)). Congress defined "wilderness" to be "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined

type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value (16 U.S.C. 1131(c))." A rail line through such an area would create a noticeable impact on the Cedar Mountain Wilderness Area. In addition, the 1 to 2 trains per week each carrying two to four loaded shipping casks of SNF from reactor sites through the wilderness would be incompatible with maintaining the wilderness values recognized by Congress. Denial of right-of-way application U 76985 is clearly required, because operation of a rail line would be inconsistent with the purpose for which the BLM manages the Cedar Mountain Wilderness Area (43 CFR 2804.26(a)(1)).

National Defense Authorization Act for Fiscal Year 2000

Additional support for not selecting Alternatives 1 and 2 is the failure to date of the Department of Defense to prepare the study and submit to Congress the report required by Section 2815 of Public Law 106-65, the National Defense Authorization Act for Fiscal Year 2000. Section 383 of Public Law 109-163 directs the Secretary of Defense to prepare and transmit to the Secretary of the Interior within six months of Interior's request an analysis of the military readiness and operational impacts of a proposed revision to a land use plan for the Utah Test and Training Range. Section 383 may speed the process of obtaining an analysis of the impacts of a land use plan amendment, but it provides no direction to the Defense Department to submit a report to Congress. In the absence of the study and report required by Public Law 106-65, the BLM could not proceed with the amendment of the Pony Express Resource Management Plan, which amendment is necessary for the grant of a rail line right-of-way.

Given the substantial basis for not selecting Alternatives 1 and 2, it is unnecessary to determine whether the grant of a right-of-way through the Cedar Mountain Wilderness Area would be precluded by the fact that such lands are withdrawn from all forms of entry, appropriation, or disposal under the public land laws. This issue is wholly distinct from the analysis above of Section 501(a) of FLPMA, Public Law 106-65, and 16 U.S.C. 1131.

Alternatives 3 and 4

Alternatives 3 and 4 are not selected because to grant application U 76986 based on the existing record would be contrary to the public interest (43 CFR 2804.26(a)(2)). The public interest requires that a decisionmaker, at a minimum, be able to articulate a rational connection between the facts found and the conclusions made. Too many questions remain unanswered to grant a right-of-way to PFS at this time. In so deciding, we acknowledge the hard work of the NRC in authoring the 2001 EIS and granting Materials License Number SNM-2513 to PFS. We further acknowledge the economic benefits that the Band could enjoy, e.g., jobs and lease income, if the PFSF were developed (see EIS at sections 6.1.5.1 (pp. 6-11 through 6-14); 6.2.1.2 (p. 6-32); 8.2.1 (p. 8-11); and 9.4.1.1 (p. 9-5)). We can not agree, however, that all appropriate land

management questions have been answered at this time. Application U 76986 should be denied.

The elimination of Alternatives 1 and 2 as reasonable alternatives by Public Law 109-163 only left Alternatives 3 and 4 for consideration. As set forth above, Alternatives 3 and 4 call for the BLM to issue a right-of-way grant for an ITF. The ITF is a 21-acre site where a crane would transfer casks of SNF from rail car to heavy-haul trailer. Figure 2.15 of the EIS at p. 2-48 depicts a typical heavy-haul tractor trailer 150 feet long and 12 feet wide. The casks would then be trucked at a speed of no more than 20 miles per hour for 26 miles south on Skull Valley Road to the Reservation. This slow rate of speed would require other traffic to reduce speed or make additional passing maneuvers (EIS at section 5.5.2.2 (p. 5-31)). Comments received from the State of Utah, dated May 8, 2006, in response to the BLM's February 7, 2006, Federal Register notice indicate that parts of Skull Valley Road are only 20-feet wide, consisting of two lanes, one in each direction, each 10-feet wide with minimal shoulder. The State notes that by necessity the slow moving, 12-foot wide PFS vehicle will have to travel near the center of the 20-foot wide road (at p. 27 and Exhibit 17).

The ITF could handle a maximum of 3 casks per single purpose train. If a maximum train size of three loaded casks were received, approximately 28 work hours are estimated to complete the transfer of the last cask to the heavy-haul trailer for delivery to the PFSF (EIS at section 5.7.2.9 (p. 5-60)). One of the casks would be transferred from its railcar onto a heavy-haul trailer, while the other casks would remain on the railcars until the heavy-haul trailer returned from the PFSF, whereupon they would be transferred to the heavy-haul trailer, one at a time, and the shipping sequence would be repeated (*Id.* at p. 5-61). A minimum of two heavy-haul trailers would be used to move SNF to the PFSF (*Id.* at section 2.2.4.2 (p. 2-47)).

At the ITF the crew would consist of four handlers, a spotter, inspector, crane operator, and a health physics staff member. The handlers would attach ropes to the ends of the cask after it is released from the railcar and help guide it into a tie-down cradle on the low-boy trailer or to the temporary storage location (EIS at section 5.7.2.9 (p. 5-60)). Shipments from the ITF to PFSF would be made only during daylight hours. Each trailer shipment would be accompanied by escorts, one vehicle traveling up to 1,000 feet in front of the trailer, one traveling up to 1,000 feet behind the trailer, to warn travelers of the slow moving truck. The trip will take approximately 1.5 hours (*Id.* at p. 5-61).

Alternative 3 calls for storage of SNF at Site A on the Reservation; Alternative 4 calls for storage of SNF at Site B on the Reservation. The NRC's issuance of Materials License Number SNM-2513 to PFS on February 21, 2006, removes Alternative 4 from consideration because the license authorizes storage at Site A only. Site B is no longer an option, and so Alternative 3 is the only alternative that remains for consideration.

In applications U 76985 and U 76986, PFS states that both the rail and heavy-haul trailer modes of transporting the casks are viable, but that "[t]he rail spur is the preferred mode of transportation to the PFSF because it involves less handling of the casks and is

therefore more efficient and timely in comparison to the highway. In addition, while there is little traffic on the Skull Valley Road, the large tractor/trailers needed to haul the casks will create some level of traffic interference, which will be avoided using the rail spur."

The EIS found that Alternatives 3 (and 4) had two disadvantages, which caused each to be rejected as a preferred alternative. The first of these disadvantages is the impact to local traffic on Skull Valley Road caused by slow moving heavy-haul trailers carrying SNF from the ITF. Such impacts would be difficult to mitigate (EIS at section 9.4.3 (p. 9-16)). The second disadvantage is the additional radiation that workers transferring SNF shipping casks from railcars to heavy-haul trailers at the ITF would incur. These additional doses could be avoided if the rail option were used instead (*Id.* at section 9.4.1.3 (p. 9-9)).

No Action Alternative

Skull Valley Road

We believe that the No Action alternative, and not Alternative 3 (or 4), is the proper choice because the EIS has failed to consider a number of important factors. First, the EIS has not sufficiently studied the impacts that will occur when SNF is removed *from* the PFSF via Skull Valley Road and sent to a permanent repository or returned to its source. The EIS has studied how transportation of SNF *to* the PFSF will occur, but it has not devoted similar consideration to how transportation of SNF *from* the PFSF will occur and, in particular, how transportation from the PFSF via Skull Valley Road will occur. This is an important consideration because the PFSF is a temporary storage facility and is not intended as a permanent repository. As noted above, service agreements between PFS and the utilities storing SNF at the PFSF require that the utilities remove all SNF from the site by the time the PFS license is terminated and PFS has completed its licensing or regulatory obligations under its NRC license. Removal of SNF from the PFSF demands a hard look.

The first page of the final EIS describes the focus of the document in this way: "This FEIS evaluates the potential environmental effects of the ISFSI proposed by PFS, including construction and operation of new transportation facilities that would provide access *to* the proposed ISFSI and a consideration of alternatives to that proposal. . . . The proposed action would include construction and operation of the proposed ISFSI, [also called the Private Fuel Storage Facility (PFSF)], including transporting SNF *to* the proposed PFSF, and the construction of a rail line from Skunk Ridge *to* the proposed PFSF site . . . (sections 1.1 and 1.2 (p. 1-1), emphasis added)."

In describing the scope of the EIS at section 1.4.1 (p. 1-14), the cooperating Federal agencies, of which the BLM is one, state: "Transportation. The analysis of potential impacts resulting from the transportation of SNF considers relevant aspects of both rail and truck transport *to* the proposed PFSF (emphasis added)." The document is replete with other statements indicating that transportation of SNF *to* the PFSF was the focus of

the document (see EIS, e.g., sections 1.5.3.1 (p. 1-17); 2.1.2.1 (p. 2-18); 2.2.4.2 (pp. 2-40, 2-43, 2-47); 5 (p. 5-1); 5.4 (p. 5-15); 5.5.2.2 (p. 5-31); 5.6.2 (p. 5-34); 5.7.2.4 (p. 5-49); 5.7.2.5 (p. 5-51); 5.7.2.6 (p. 5-53); 5.7.2.8 (pp. 5-57 through 5-58); 5.7.2.9 (pp. 5-58 through 5-62); 5.8.3.2 (p. 5-71); 5.8.4 (p. 5-72); 6 (p. 6-1); 6.1.4.3 (p. 6-10); 6.1.5.3 (pp. 6-12 through 6-14); 6.1.8.3 (p. 6-20); 9.3 (p. 9-2); and 9.4.3 (p. 9-16); Appendix A Scoping Report at section 3.1 (p. 12); Appendix A Supplemental Scoping Report at section 3.1 (pp. 12 - 13); Appendix C (p. C-1); Appendix D at sections D.3 through D.3.1.1 (pp. D-20 through D-21); and Appendix G at section G.2 (p. G-9)).

We acknowledge a discussion in the EIS of the radiological risk of transporting 4,000 SNF canisters from the PFSF to the Utah-Nevada border at section 5.7.2.7 (pp. 5-54 through 5-57) and Appendix D at section D.3.2 (p. D-26). Tables 5.11 and 5.13 (pp. 5-56 and 5-57) show the annual and cumulative 20-year campaign radiation doses and health risks associated with shipment of SNF from the PFSF to the Utah-Nevada border via the ITF. In addition, we note that sections 2.1.2 (p. 2-18); 2.1.2.2 (p. 2-26); 2.1.6 (pp. 2-32 through 2-33); 5.7 (p. 5-35); 5.7.1.2 (p. 5-38); 5.7.2 (p. 5-39); 5.7.2.1 (p. 5-41); 5.7.2.2 (pp. 5-42 through 5-43); 5.7.2.3 (pp. 5-46 through 5-47); and 5.7.2.11 (p. 5-63); and Appendix C at section C.2 (pp. C-2 and C-4) address removal of SNF from the PFSF; these sections, however, do not take a hard look at how removal will occur via Skull Valley Road, a key access route now that Alternatives 1, 2, and 4 have been eliminated. This same deficiency is present in Appendix G, which addresses public comments at sections G.3.4.1.2 (p. G-74); G.3.4.1.3 (p. G-75); G.3.4.2.4 (p. G-77); and G.3.16.3.3 (p. G-330). While the radiation doses and health risks identified in Tables 5.11 and 5.13 are important, they are but one facet of the analysis. Not explored are the practical impacts occasioned by using Skull Valley Road for removal. Whether Skull Valley Road will be adequate to the task when removal of SNF occurs at the conclusion of the license term is unanswered. Similarly unclear is whether Skull Valley Road will be adequate to the task if removal occurs over a brief period of time, rather than a 10- or 20-year period. The socioeconomic and community resources (see EIS at section 5.5 (p. 5-23)) that will be impacted by removal of SNF via Skull Valley Road have not received the required hard look. The EIS examines only one part of the analysis, albeit an important one, but largely neglects the impacts that will occur when removal of SNF is scheduled to occur via Skull Valley Road.

Tekoi Balefill

The EIS also neglects an analysis of the Tekoi Balefill, a disposal site for bundled waste that the Goshute Tribe has opened on its Reservation. The Tekoi Balefill is important for an analysis of Alternative 3 (and 4) because the waste received at the Tekoi Balefill is presently transported by truck over the same road, Skull Valley Road, that would be used to carry SNF to and from the PFSF. Comments received by the BLM from the State of Utah, dated May 8, 2006, in response to the BLM's February 7, 2006, Federal Register notice estimate that Balefill traffic will account for 130 to 160 truck trips per day on Skull Valley Road (at p. 32). This road is 20-foot wide, much of it without shoulders, the State notes, and the heavy-haul trailers used by PFS are expected to be 12 feet wide (at pp. 26-27).

The absence of any discussion of the Tekoi Balefill in the December 2001 EIS is understandable because the Balefill was not underway until 2004, following issuance of the 2001 EIS. An environmental document, dated May 2004, was prepared for this disposal site by BIA, and consideration of the PFSF and alternate routing was factored into its cumulative impacts analysis at section 6.7 (p. 6-7). The BLM, however, had no part in preparing this document.

Additional comments underscore the importance of Skull Valley Road to those using it. In a letter dated April 13, 2006, the Utah Test and Training Range Manager stated that SR-196 (Skull Valley Road) is the main route to Dugway Proving Ground, Skull Valley ranches, public land in Skull Valley, and is "one of only three emergency evacuation routes for the chemical weapons incinerator in Tooele Valley." Whether Skull Valley Road can accommodate the traffic from the Tekoi Balefill and PFSF, in addition to other regular users of the road, is a question as yet unanswered by the BLM. In the absence of such answer, it would be contrary to the public interest to issue a right-of-way grant to PFS.

Storage of hazardous materials

Traffic caused by the Tekoi Balefill and other users of Skull Valley Road also raises the question whether the transfer of SNF via Skull Valley Road will proceed as described above at Alternative 3 or remain at the ITF for longer periods of time. The importance of this question is pointed out by a number of commenters who claim that storage of SNF will occur at the ITF. Responding to the BLM's February 7, 2006, Federal Register notice, Senator Orrin Hatch and Senator Robert Bennett state in a letter dated May 2, 2006, that use of the ITF would violate BLM policy against using BLM land for the *storage of hazardous materials*. Senators Hatch and Bennett quote from the 1990 Pony Express RMP, which states at page 4 in addressing military activities, "Public land will not be made available for inappropriate uses such as *storage or use of hazardous materials* (munitions, fuel, chemicals, etc.) and live artillery firing (emphasis added)." The PFS operation on the ITF will not be a flow-through operation, the Senators state, and SNF casks will be stored at the ITF awaiting transfer for truck transport.

If storage were to occur at the ITF under PFS's transportation plan, denial of application U 76986 would be appropriate. As noted above, the BLM may deny a right-of-way application if the proposed use is inconsistent with the purpose for which the BLM manages the public lands in the application (43 CFR 2804.26(a)(1)).

Congressional enactment of Public Law 109-163 designating the Cedar Mountain Wilderness Area changed the decisional landscape. The preferred alternative of the EIS, shipment by rail, was no longer a possibility. What remained was a set of discarded

alternatives, Alternatives 3 and 4, that appear not to have received the attention of the rail alternatives (Alternatives 1 and 2.) The focus on transportation by rail instantly shifted to transportation by heavy-haul trailers when Congress designated the Cedar Mountain Wilderness Area.

Understandably, the EIS is silent on the designation of the Cedar Mountain Wilderness Area. Whether use of the ITF and heavy-haul trailers on Skull Valley Road will impact the use of the Wilderness is yet another question to be addressed. The Cedar Mountain Wilderness Area is atypical; low-level overflights and operations of military aircraft, helicopters, missiles, or unmanned aerial vehicles over the wilderness are not precluded.

Additional study of the questions set forth above is necessary. Careful consideration of these questions is appropriate because of the uncommon nature of the cargo being transported. The BLM's duties as a land manager require that it take a hard look at these questions. To grant the right-of-way sought by PFS without answers to these questions would be to ignore its land management duties and the needs of the affected public. In so concluding, we are not unmindful of the economic benefits, such as jobs and lease income, that could accrue to the Band if the PFSF were developed (EIS at sections 6.1.5.1 (pp. 6-11 through 6-14); 6.2.1.2 (p. 6-32); 8.2.1 (p. 8-11); and 9.4.1.1 (p. 9-5)). To grant the right-of-way sought by PFS at this time, however, would be contrary to the public interest (43 CFR 2804.26(a)(2)).¹

Yucca Mountain

Additional support for our selection of the No Action alternative above is provided by a number of statements from elected officials and recent legislation. These statements and legislation further assist in defining the public interest.

In correspondence with Senator Hatch dated October 26, 2005, Secretary of Energy Samuel Bodman concluded that "the Private Fuel Storage Facility initiative is not part of the Department's overall strategy for the management of spent nuclear fuel and high-level radioactive waste." Noting that the PFS facility would be constructed and operated by the private sector outside the scope of the Nuclear Waste Policy Act (NWPA), the Secretary found that the Department of Energy (DOE) would be prohibited by statute from providing funding or financial assistance for the project.

Secretary Bodman made clear in his letter that the DOE is continuing to work toward the successful development of the Yucca Mountain repository. The Secretary stated that development of Yucca Mountain as a permanent geologic repository for the Nation's

¹ We note with interest *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006), which held that the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy a reasonableness review.

high-level radioactive waste will reduce, if not eliminate, the need for high-level radioactive waste to go to a private temporary storage facility, such as the PFSF.

Secretary Bodman underscored this message in a letter to Senator Hatch dated May 5, 2006: "A deep geologic repository at Yucca Mountain is in our national interest, and indeed is critical to our Nation's energy security and national security."

Former Secretary of Energy Spencer Abraham, in prior correspondence with Senator Hatch, dated July 8, 2002, reached many of these same conclusions. Secretary Abraham stated that the NWPA authorizes the DOE to provide funding and financial assistance only for shipments of spent fuel to a facility constructed under that act. Because the PFS/Goshute facility would be constructed outside the scope of the act, the DOE could not fund or otherwise provide financial assistance for PFS. Nor could the DOE monitor the safety precautions that a private facility may install. All costs associated with the PFS plan would have to be covered by the members of the PFS private consortium, the Secretary concluded. As in the case of Secretary Bodman, Secretary Abraham found that the best course of action is to pursue permanent storage at Yucca Mountain.

The Yucca Mountain repository referred to by Secretaries Bodman and Abraham is the focus of Public Law 107-200. This law, approved July 23, 2002, is a joint resolution of the Senate and House of Representatives approving the site at Yucca Mountain as a repository for the disposal of high-level radioactive waste and spent nuclear fuel, pursuant to the NWPA (116 Stat. 735). Passage of this law was preceded on February 15, 2002, by the President's recommendation to Congress that Yucca Mountain be used for the storage of nuclear waste.

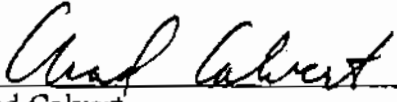
The legislative history accompanying Public Law 107-200 points out that pursuant to the NWPA amendments of 1987, Congress selected the Yucca Mountain site in Nevada as the single site to be characterized by DOE for long-term geologic disposal of the Nation's high-level radioactive waste inventories (H.R. Rep. No. 107-425 (May 1, 2002)).

Conclusion

Alternatives 1 and 2 are not selected because to grant the right-of-way sought by PFS in application U 76985 would be inconsistent with the purpose for which the BLM manages the public lands and inconsistent with Section 501(a) of FLPMA (43 CFR 2804.26(a)(1) and (a)(4)). Alternatives 3 and 4 are not selected because to grant the right-of-way sought by PFS in application U 76986 based on the existing record would be contrary to the public interest (43 CFR 2804.26(a)(2)). The No Action alternative is selected instead.

By selecting the no action alternative, the BLM has used all practicable means to avoid or minimize environmental harm, as required by Council on Environmental Quality regulations at 40 CFR 1505.2(c). As set forth above, the decision to adopt the No Action alternative means, in effect, that right-of-way applications U 76985 and U 76986 will be

denied. A decision to this effect will be rendered to PFS. The BLM would, of course, consider any future application by PFS for this project if the application addresses the deficiencies in the existing record discussed in this ROD.



Chad Calvert
Acting Assistant Secretary
Land and Minerals Management
U.S. Department of the Interior

9/7/06
Date

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